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DE RUEHQT #0913/01 2671847  
ZNR UUUUU ZZH  
P 231847Z SEP 08  
FM AMEMBASSY QUITO  
TO RUEHC/SECSTATE WASHDC PRIORITY 9414  
INFO RUEHBO/AMEMBASSY BOGOTA 7752  
RUEHBR/AMEMBASSY BRASILIA 3990  
RUEHCV/AMEMBASSY CARACAS 3190  
RUEHLP/AMEMBASSY LA PAZ SEP LIMA 2812  
RUEHGL/AMCONSUL GUAYAQUIL 3812

UNCLAS QUITO 000913

SENSITIVE  
SIPDIS

FOR USAID/LAC

E.O. 12958: N/A  
TAGS: [SENV](#) [ECON](#) [SOCI](#) [PGOV](#) [EC](#)  
SUBJECT: RIGHTS OF THE ENVIRONMENT IN ECUADOR'S NEW  
CONSTITUTION

REF: QUITO 369

¶1. (U) Summary: Ecuador's proposed constitution contains possibly significant changes in the area of environment, generally centralizing management while expanding the basis for conservation and enforcement. Nature, or "Pachamama" (a Quechua-Spanish hybrid word for "earth mother"), is given explicit rights to exist and be maintained. It is unclear how these rights will be applied, how they will conform to other sections of the draft constitution dealing with water, protected areas, and indigenous territories, and whether they will change environmental policy or practice in Ecuador. End summary.

¶2. (U) The following is Embassy's analysis of the most important environmental provisions in the draft constitution:

¶3. (U) Right of Nature to Exist (articles 10, 14, 32, 71, 72). The new constitution describes environmental rights in the context of "collective rights," emphasizing that human communities must coexist with nature. Nature has a right to exist and to be maintained, but humans also have the right to benefit from nature to live well (concepts of "buen vivir" or "sumak kawsay" ) roughly "good living," articles 14, 32). The central government will be responsible for limiting activities that may contribute to the destruction of species or ecosystems. As such, the environment has status equal to that of citizens of Ecuador, and all current legislation touching upon the environment notionally will need to be revised to reflect this. The draft constitution also stipulates that the state will not be party to any treaties which may be harmful to the sustainable management of biodiversity, human health or the "collective rights of nature" (article 403).

¶4. (U) Claims of Environmental Damage. The constitution will create a new Environmental Prosecutor's Office ("Defensoria") to manage claims of environmental damage (article 399). Part of the guidelines laid out for this office say that individuals or companies accused of environmental damage will now be guilty until proven innocent. Apparently any individual may present a claim to the Prosecutor's Office on behalf of the environment. An economic analyst has pointed out that, using the case filed against Chevron claiming damages of \$8-16 billion as precedent, state oil company Petroecuador could also now be responsible for billions of dollars of environmental damage (note: Petroecuador accounted for 90 percent of all oil spills in Ecuador last year, according to official government data quoted by local newspaper El Universo). It is not yet clear to which part of government the Environmental Prosecutor's Office will report, but some have suggested it

will report directly to Ecuador's new National Assembly (Congress).

15. (U) New Superintendency of Environment. The constitution defines an environmental superintendency as a technical agency that will have responsibility for supervision, auditing, and control of environmental activities by public and private entities (article 213). There are already plans underway (under the existing constitution) to create a Superintendency by Presidential decree in the near future, and planning has been in process since January with technical assistance from USAID. This entity will reportedly be distinct from the Environmental Prosecutor's Office (though the differences are not yet established), and will have direct authority to sanction violations of environmental law.

16. (SBU) New strategic sectors. The draft Constitution specifically identifies "strategic sectors" to include energy in all forms, non-renewable natural resources, water (the draft identifies water as an inalienable right of nature and of humans), and biodiversity (article 313). The central government will now be responsible for "guaranteeing" water conservation and the integrated management of hydrological resources (articles 314, 318, 411). "All forms of privatization" of water are prohibited, but public or community agencies may allocate water resources for consumption, agriculture, nature, or productive uses (in that order). Article 408 specifies that the central government's share of earnings from non-renewable resources, including water, must now be no less than 51%. Environmental and "ecosystem" services (potentially carbon markets) may also

possibly be subject to the 51% rule (note: controversy arose in early September when PAIS members of the Constituent Assembly told the press that article 408 had been added to the draft subsequent to, and outside of, the committee review process).

17. (U) Biodiversity. The constitution declares Ecuador "free" from genetically modified agriculture and seeds (GMOs), except in the case of national interest decreed by the President and approved by the national assembly (article 401). This contrasts with the 1998 constitution, which says only that the state must strictly regulate GMOs. In a completely separate part of the constitution (Art. 15), there is a prohibition on the production, sale, or importation of GMOs that are harmful to human health or ecosystems.

18. (SBU) State Management of Protected Areas. The state must now "fund the sustainable management" of protected areas (article 405), and no protected area may be opened for exploitation, except by presidential decree. The latter is currently the case, but this point has now been elevated to constitutional status. The constitution also states that any development (commercial or otherwise), that may have environmental or cultural impacts requires "prior consultation" with people living on or around the land in question. (Note: this will be particularly important if the GOE decides to open the Ishpingo-Tambococha-Tiputini (ITT) field in Yasuni National Park to drilling (reftel); but as with so many sections, the implications cannot be known until the implementing laws regarding protected areas are written.)

19. (SBU) Property. The constitution's new clauses on property say that the state may expropriate property, with compensation, in order to pursue social development plans, to "sustainably manage" the environment, or for the collective well-being (article 323). It prohibits all forms of confiscation, however, saying that expropriation can happen only after property values and compensation have been established. The current constitution has similar provisions - that municipalities may expropriate property in order to "conserve the environment for future development" (article 32) - but the draft constitution suggests that the federal government could play a more active role in defining the social or environmental function of land.

110. (SBU) Galapagos special regimen. Currently, the

Galapagos islands are governed by a special law enacted in 1998. The new constitution confirms the special status of the islands, but stipulates that a new "special regimen" law for the islands will be written (articles 242, 245). It proposes a governing council for the Galapagos made up of mayors, a representative of the President, a representative of parish committees, and possibly other parties. The text does not mention the Galapagos National Park, and says that the islands should be governed with attention to "conservation and 'buen vivir'," apparently placing the two on equal footing. Once again, the new implementing law will determine the real importance of these changes. (Comment: New GNP director Edgar Munoz, appointed August 11, is rumored to be an advocate of the tourism industry and affiliated with entrenched political and economic interests in the archipelago. In a meeting with Post, he seemed to have no strong opinions about the draft constitution, even though the National Park \* the only institution in Galapagos charged with conservation \* appears to lose significant power. End comment.).

11. (SBU) Comment: The proposed constitutional changes could greatly increase environmental protections, although setting up potentially serious conflicts with development activities. The draft constitution does not ban extractive activity (as certain environmentalists in the Constituent Assembly had hoped), and the Correa Administration has the flexibility to move forward with mining and petroleum projects (and it appears that it wants these projects and the income they will generate). How this plays out will depend on the detail and direction of implementing laws enacted later, as well as the balance the government will seek between the environment and development, since it will have considerable discretion to move either way. End comment.  
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